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No. ~~772 Misc.~~

Office-Supreme Court, U.S.
FILED
DEC 14 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

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DEC 8 1967
A. L. S.

PHILLIP JEROME STILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

ERWIN N. GRISWOLD,
Solicitor General,

Department of Justice,
Washington, D. C., 20530.

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner was tried before a jury in the United States District Court for the District of Rhode Island and was found guilty of failure to comply with an order of a local Selective Service board to submit to induction into the armed forces, in violation of 50 App. U.S.C. 462 (R. 1, 429). On March 17, 1967, he was sentenced to imprisonment for two years (R. 448). The court of appeals affirmed without opinion on September 20, 1967.

Petitioner was classified 2-S, with a student deferment, in October 1964. On November 9, 1965, having left college, he was reclassified 1-A. Notice of this reclassification was mailed to him on November 17, 1965 (R. 42).

Petitioner was twice ordered to report for physical examinations but he failed to appear on either occasion (R. 42-44). He was sent a delinquency notice on January 11, 1966 (R. 44), and on January 14

he was ordered to report for a pre-induction physical examination to be held on January 20 (R. 45).

Thereafter, on January 17 petitioner wrote the local board a letter to which he appended this notation: "P.S. I am going to take a vacation trip of a month or two. I tell you this because my leaving town with no definite forwarding address might otherwise seem evasive. Don't worry, I'll send you post cards letting you know how I'm getting along" (Gov. Ex. 6; R. 437). On January 20 the local board mailed petitioner still another delinquency notice since he failed to report for a physical examination on that date (R. 45).

On January 24, 1966, the clerk of the local board sent by registered mail a notice to report for induction on February 9, 1966, addressed to petitioner at 10 Fortin Road, Kingston, Rhode Island, (the address given in his current-information questionnaire) (Gov. Ex. 2; R. 433, 45, 47-48, 55, 57-58). Petitioner's mother signed for the receipt of this order (Gov. Ex. 2; R. 433, 310). Petitioner, however, failed to report for induction as ordered (R. 45-46, 135).

On February 14, five days after petitioner was scheduled for induction, the local board received a post card from Knoxville, Tennessee, signed by petitioner, advising the Board: "I'm still thinking about you and will let you know as soon as I have an address" (Gov. Ex. 7; R. 438). On February 21, the local board received a post card from petitioner giving a Mexican address (Gov. Ex. 8; R. 439). Petitioner's mother testified that when he returned home on about March 15, 1966, she gave him the induction order, which she had not opened (R. 310-312).

DISCUSSION

1. Petitioner offered a defense of mental incompetency. Dr. Quartaroli, a psychiatrist who started treating petitioner after March 22, 1966 (R. 193), testified as a defense witness that at the time in question (February 9, 1966) petitioner's emotional condition

rendered him unable to conform his conduct to the requirement of the law that he appear for a physical examination, despite his ability to understand intellectually the seriousness of the offense (R. 259-262), and his capacity to distinguish between right and wrong (R. 282). Dr. Silverman, a psychologist, testified as a defense witness that petitioner was suffering from an emotional problem of a depressive nature (R. 350, 372).

Dr. Vadeika, a Navy psychiatrist who examined petitioner in the presence of two other Navy doctors on January 13, 1967, testified as a government rebuttal witness. (R. 377, 379, 384-385, 395-396). It was his opinion that at the time in question petitioner was emotionally disturbed but not suffering from a mental disease or defect; that he was able to distinguish right from wrong and to adhere to the right; and that he did have substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law (R. 380-383). Petitioner concedes that the trial court properly instructed the jury on the defense of incompetency (Pet. 28; see R. 424-427), but contends that the jury "arrived at the wrong verdict." This assertion does not raise an issue appropriate for this Court to review.

2. Petitioner also argues that there was no culpable intent to evade the orders of the Selective Service board; this issue, also, was one for resolution by the jury. The court instructed the jury that it had to find wilfulness and specific intent on petitioner's part in failing to submit to induction (R. 425-427). The evidence demonstrated that petitioner repeatedly failed to obey orders to report for pre-induction physical examinations and deliberately absented himself from his residence at 10 Fortin Road (the only official address he had given the local board) at a time when he had reason to believe that an order to report for induction was imminent. Manifestly, petitioner could not insulate himself from criminal liability by the simple expedient of leaving his regular residence. From all the attendant circumstances, the jury was warranted in inferring criminal intent. See Silverman v. United States, 220 F. 2d 37, 40 (C.A. 8); Williams v.

United States, 203 F. 2d 85, 87 (C.A. 9), certiorari denied, 345 U.S. 1003.

3. The trial court did not abuse its discretion by limiting the scope of the cross-examination of government witnesses. Counsel for petitioner, on cross-examination, sought to probe the authority of the clerk of the local board to sign the induction notice. The court properly ruled that the question of her authority could only be challenged by an administrative appeal, and not by a collateral attack in this prosecution (R. 86-88). See Kaline v. United States, 235 F. 2d 54, 62 (C.A. 9). The trial court also acted properly in precluding cross-examination of Dr. Vadeika, the government psychiatrist, as to petitioner's physical fitness for military service, ruling that the sole question at issue was whether there had been a wilful failure to report for induction (R. 388-389). Whether petitioner would or would not have been accepted had no bearing on the lawfulness of his failure to report in the first instance.

4. The Solicitor General is concerned with another aspect of the case. In order that this may be fully understood, it is desirable to quote here the following material which appears at the beginning of the transcript (R. 29-33), being the proceedings at the opening of court on Tuesday, January 17, 1967:

> MR. ROGERS [counsel for the defendant]. After being advised to report here for trial at 2 o'clock here this afternoon, myself and John Notte, Esq. had a conference with the United States District Attorney for this District, Mr. Frederick Faerber, Esq., who advised me--and I represent to this Court--in the event that my client, who stands indicted for failure to report for induction were in fact to submit to induction into the military forces of this country, and were found by the Selective Service Authority to in fact be unacceptable, that the United States Attorney's office would in fact move in open court to dismiss the indictment against the defendant.
>
> I make those representations to this Court as my best recollection of the conference with Mr. Faerber, and I ask Mr. Notte to state for the record whether or not this is a fair and accurate representation of the conversation we had.

MR. NOTTE [co-counsel for defendant]. This is a fair and accurate representation, your Honor.

MR. GEARON [Assistant United States Attorney]. Your Honor, the position of the United States Attorney is essentially what Mr. Rogers said. However, it is felt, for the purposes of this record, that the reason for so doing is that the Selective Service takes the position that if a person would report for induction, it is better to have them so report than to be incarcerated in jail in the event of a conviction upon this type of case.

However, because of this case and the situations and the examinations made by psychiatrists, I feel it should be placed in the record one of the considerations for the Government taking this position is that although the man is charged with failure to report for induction--which does not mean necessarily he will become a member of the Armed Forces--it is directing him, as a citizen of the United States within military age, to submit to an induction and physical examination to determine his eligibility for the Armed Forces. That is what this indictment charges him with: failure to report for induction.

THE COURT: I thought it charged him with failure to report for examination.

MR. GEARON. No, failure to report for induction, submit to the induction in the Armed Forces. But because of the uniqueness of this situation and in view of the fact that there has been psychiatric examination of this defendant, and a psychiatric examination by three doctors at the Naval Base in Newport on Friday, January 13, 1967, wherein the conclusion at the end of the examination, signed by the three physicians, psychiatrists,--their comment is as follows:

> From the above history and findings it is the opinion of this board of psychiatric examiners that this person was at the time of any alleged offenses so free from mental defect, disease or derangement as to be able concerning any particular acts charged to distinguish right from wrong and to be able concerning any particular acts charged to adhere to the right. He possesses sufficient mental capacity to understand the nature of any proceedings against him and intelligently to conduct or cooperate in his own defense. It is also the opinion of this board that this person is unfit for military service.

And it is signed by E.A. Vadeika, Frank M. Moscarillo, A. H. Schwartz.

I have a further examination conducted by Max Faintych.

THE COURT. Would you gentlemen be good enough to make clear to me what this is all about?

MR. GEARON. This is the position: that if this man submits to induction, in all probability he will not be acceptable anyway. But in view of the fact that he is willing to go down for induction, the Government would take the position--and the United States Attorney has recommended--that there would be no further prosecution because it would really in effect--if he were a person who could be eligible for the Armed Forces, there would be a point in going forward with it. But insofar as this person, while charged with failure to report for induction, which is a serious crime,--

THE COURT. Are you ready to go to trial or aren't you?

MR. GEARON. We would continue it if this man--

THE COURT. I see no need of it. Let's try this case and get it behind us. That is my position. Either he is guilty or he isn't.

(Bench conference concluded)

(Jury impaneled)

In the view of the Solicitor General, the Assistant United States Attorney acted wisely in expressing a willingness to explore avenues alternative to prosecution. Although the defendant has been found not to have been "insane," as that term is used in the law, there was some reason to think that he was in fact so disturbed that his conduct, though unjustified, may not have warranted criminal prosecution and incarceration if he had, even though belatedly, complied with the requirements of the Selective Service Act.

However, there does not seem to be any basis upon which these views are relevant at this time. The statement by counsel for the petitioner did not amount to a formal motion for a continuance; and even if it is treated as a motion for continuance, the question whether a continuance should be granted is a matter for the discretion of the district court. That court did exercise its discretion here, though perhaps hastily.

Nor can it be said that prosecution of the case was in any way inconsistent with Departmental policies or directives as communicated to the United States Attorneys. When a registrant commits a

violation of the Selective Service laws but "corrects" that delinquency by actually entering into military service, it is the policy of the Department of Justice to refrain from prosecution or, if prosecution has already been instituted, to seek leave of court to dismiss the indictment. It is not the general policy, however, to refrain from prosecution merely because it appears that the delinquent registrant might have been rejected, or might be rejected, if he sought to comply with his Selective Service obligations.

In the instant case, it does not appear that the registrant made any effort to correct his delinquency between March 15, 1966, when he returned to his home, and the eve of trial in January, 1967, when his counsel intimated that petitioner would or might be prepared to submit for induction--a suggestion which was made only after it had become apparent that petitioner would doubtless prove unacceptable for military service. Prosecution in such circumstances does not represent a departure from policies regularly applied by this Department.

In sum, no basis has been found upon which, at this stage, the matter can be taken out of the channels of the law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.